IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 19.04.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.R.C.No.1951 of 2003
and
Crl.M.P.No.12947 of 2003

G.Sankar ..Petitioner/Accused

vs.

A.B.Varadarajan ..Respondent/Complainant

Prayer: This Revision has been preferred under section 397 & 401 of Cr.P.C.against the judgment dated 04.11.2003 passed by the Additional Sessions Judge (FTC), Kancheepouram in C.A.No.39 of 2003, which was filed against the judgment dated 1.4.2003 made in C.C.NO.400/2001 on the file of the Judicial Magistrate No.I, Kancheepuram.

For Petitioner : Mr.T.R.Ravi

For Respondent : Mr.P.Mohan

ORDER

This Revision has been preferred against the judgment passed in C.A.No.39 of 2003 on the file of the Additional Sessions Judge (FTC), Kancheepuram. A private complaint was filed by the complainant/respondent under Section 200 of Cr.P.C., for an offence under Section 138 of the Negotiable Instruments Act on the ground that Ex.P.7 and Ex.P.8 cheques for Rs.1,80,000/- and for Rs.10,000/- respectively drawn by the accused in favour of the complainant on 3.9.2001 on presentation for collection were dishonoured by Indian Overseas Bank, Ennaikara Theru branch, Kancheepuram.

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2. The case was taken on file by the learned Judicial Magistrate No.I, Kancheepuram, as C.C.No.400 of 2001 and on appearance of the accused on summons copies under Section 207 of Cr.P.C., were furnished to the accused and when the offence was explained to the accused and questioned the accused pleaded not guilty.

3. Before the trial Court P.W.1 to P.W.3 were examined and Ex.P.1 to Ex.P.16 were marked. The case of the complainant as narrated in the private complaint was spoken to by P.W.1. The evidence of P.W.1 was corroborated by P.W.2 and P.W.3, who are bank officials.

4. After going through the oral and documentary evidence, the learned trial judge has come to a conclusion that the offence under Section 138 of the Negotiable Instruments Act has been made out against the accused and accordingly the learned Judicial Magistrate has convicted and sentenced the accused to pay a fine of Rs.500/- with default sentence and directed to pay a compensation of Rs.1,80,000/- to the complainant under Section 357 (3) of Cr.P.C. Aggrieved by the findings of the learned trial Judge, the accused has preferred an appeal before the learned Additional Sessions Judge (FTC), Kancheepuram, in C.A.No.39 of 2003. The first appellate judge, after scanning the evidence both oral and documentary let in before the trial court and after hearing the counsel for the appellant as well as the counsel for the respondent, has come to the conclusion that the sentence imposed by the trial judge is not in accordance with law and accordingly allowed the appeal thereby setting aside the judgment of the trial Court and remanded the mater for imposing punishment in accordance with law. The said judgment of the first appellate Court has been challenged by the accused in this revision.

5. Now the point for determination in this revision is whether the order of the first appellate Court is in accordance with law or against the provisions of law as contended by the learned counsel for the revision petition to warrant any interference by this Court?

6.The Point:-

6(a) A reading of the operative portion of the judgment of the first appellate Court will go to show that the first appellate Court has allowed the appeal but has set aside the sentence and remanded to the trial Court for imposing a punishment in accordance with law. The circumstance which made the first appellate Court to give such a finding is in the judgment the trial Court has convicted and sentenced the accused under Section 138 of the Negotiable Instruments Act to pay a fine of Rs.500/- with default sentence and also has directed the accused to pay a compensation of Rs.1,80,000/- under Section 357(3) of Cr.P.C., with default sentence. The learned first appellate Court has correctly held that a compensation under Section 357(1) of Cr.P.c., can be awarded only from out of the fine amount imposed by the trial court and not under Section 357(3) of Cr.P.C. The said finding of the learned trial judge is

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in conformity with law. But as pointed out by the learned counsel for the respondent that the direction of the first appellate court to the trial Court only to enhance the punishment after confirming the conviction is not proper in lieu of the provision contained in Section 386 of Cr.P.C. Section 386 of Cr.P.C., reads as follows:-

> "Powers of the Appellate Court_
> After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may_
>
> (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction_
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or
> (ii) alter the finding, maintaining the sentence, or
> (iii) with or without altering the findings, alter the nature of the extent, or the nature and extent, of the sentence, but not so as to enhance the same;
>
> (c) in an appeal for enhancement of sentence_
> (i) reverse the finding and sentence an acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or
> (ii) alter the finding maintaining the sentence, or
> (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;
>
> (d) in an appeal from any other order, alter or reverse such order;
>
> (e) make any amendment or any consequential or incidental order that may be just or proper;
>
> Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

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Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

6(b) Focusing the attention of this Court to Sub-clause (b) of Section 386 of Cr.P.C., the learned counsel for the respondent would contend that the order of the first appellate Court directing the trial Court after remanding the matter with a direction to decide only the punishment is not in accordance with law. The learned counsel would represent that in an appeal for conviction the appellate Court can reverse the finding and sentence or acquit or discharge the accused or order him to be retried by a court of competent jurisdiction subordinate to such appellate Court or committed for trial. Apart from this, the first appellate Court cannot remand the matter only for the purpose of awarding sentence alone which is improper and illegal. Both the learned counsel would fairly concede that for the purpose of awarding sentence a direction cannot be given by an appellate Court to the trial Court after setting aside the judgment of the trial Court. So in my view that the Judgment of the first appellate directing the trial Court for imposing only punishment after remand is illegal and in contravention of the provision contemplated under sub-clause (b) of Section 386 of Cr.P.C. After setting aside the judgment the first appellate Court ought to have either acquitted or discharged the accused or ordered for retrial. But unfortunately in this case, the first appellate Court has ordered the trial Court to give only punishment which is not contemplated under law. Under such circumstance, it becomes necessary for this Court to interfere with the judgment of the first appellate Court in C.A.No.39 of 2003 on the file of the Additional Sessions Judge, Kancheepuram. Point is answered accordingly.

7. In fine, the revision is allowed and the trial Court shall conduct retrial of the case and dispose of the same in accordance with law within a period of two months from the date of receipt of this order. Connected Crl.M.P.No.12947 of 2003 is closed.

ssv

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

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To

1. The Additional Sessions Judge
   (FTC), Kancheepuram.

2. Through:- The Principal Sessions Judge,
   Kancheepuram.

3. The Judicial Magistrate No.I,
   Kancheepuram.

4. -do-Thro' The Chief Judicial Magistrate,
   Kancheepuram.

+1 cc to Mr.N.Kanakaraj, Advocate Sr.No.25977.

+1 cc to Mr.M.Manoj Sreevalsan, Advocate Sr.No.25900.

VC(CO)
dcp/26.4.07 Crl.R.C.No.1951 of 2003

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